No. 85-6725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM J. BOURJAILY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether, in order to admit an alleged co-conspirator's declarations against a defendant under Federal Rule of Evidence 801 (d)(2)(E), the court must determine by independent evidence a) that a conspiracy existed, and b) that the declarant and the defendant were members of this conspiracy?

2. Assuming that the court must make these determinations, upon what quantum of independent proof must they be based?

3. Whether, as a requirement for the admission of a co-conspirator's statement against a defendant, the court must assess the circumstances of the case to determine whether the statement carries with it sufficient indicia of reliability?

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PROCEEDINGS BELOW

William Bourjaily, the petitioner, was tried and convicted in the United States District Court for the Northern District of Ohio of two offenses, conspiring to possess and distribute cocaine in violation of 21 U.S.C. § 846 and possession with intent to distribute cocaine in violation of 21 U.S.C. § 841 (A)(1).[1] He appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed his convictions on January 15, 1986. *United States* v. *Bourjaily*, 781 F.2d 539 (6th Cir. 1986). Petitioner filed a timely petition for certiorari, and this Court granted the writ on October 14, 1986. ___ U.S. ___, 107 S.Ct. 268 (1986).

JURISDICTION

The United States brought this criminal case in the district court. Petitioner's appeal as of right to the court of appeals was grounded in 28 U.S.C. § 1291. This Court has jurisdiction over his case pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

Federal Rule of Evidence 104 (a), (b):

> (a) Questions of admissibility generally.—Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of the evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the

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[1] Petitioner was sentenced to concurrent prison terms of 15 years and to a three-year special parole term on the possession count.

rules of evidence except those with respect to privilege.

(b) Relevancy conditioned on fact.—When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Federal Rule of Evidence 801 (d)(2)(E):

(d) Statements which are not hearsay.—A statement is not hearsay if—

. . .

(2) Admission by party-opponent.—The statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Federal Rule of Evidence 1101 (d):

. . .

(d) Rules inapplicable.—The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact.—The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

STATEMENT OF THE CASE

Petitioner was arrested immediately after a package containing a kilogram of cocaine was placed into his car by a co-defendant, Angelo Lonardo. (J.A. 45-46) When Federal Bureau of Investigation agents seized and searched petitioner's car, they found not only the cocaine but also approximately $20,000 in cash. (J.A. 149)

The only evidence, other than statements made by Lonardo, that implicated petitioner on both the conspiracy and the possession charges was testimony by the FBI agents concerning the arrival of petitioner's car at the parking lot of a Hilton Hotel, Lonardo's removal of the package from the car of a third person (Clarence Greathouse), Lonardo's placement of the package in petitioner's car, and petitioner's arrest and searches incident thereto.

Over petitioner's objection, the government played for the jury tape recordings that it made of conversations between Lonardo and the source of the cocaine, Clarence Greathouse.[2] Greathouse had consented to cooperate with federal agents as part of an agreement that disposed of the government's case against him. (J.A. 7)

In one taped conversation between Greathouse and Lonardo on May 12, 1984, Lonardo indicated that he had talked to "the people" who were interested in selling cocaine and that the deal would be set up as Greathouse and Lonardo had done it in the past. (J.A. 88-89) Lonardo indicated that he would "try to set some people up." (J.A. 94) Lonardo stated that his contacts did not know that Greathouse was the supplier and that he wanted to keep it that way. (J.A. 94) On May 17, Greathouse asked Lonardo for money, and Lonardo telephoned to arrange for delivery on May 19. (J.A. 116-19) Several conversations between the two followed. (J.A. 120-30) On May 24, Greathouse told Lonardo that the cocaine had arrived, and Lonardo reported that he would try to contact some people, but that he had told them the deal was off because of a misunderstanding about the purchase price. (J.A. 135)

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[2] The government taped telephone calls and also equipped Greathouse with a body recorder.

On May 25, Lonardo told Greathouse that he had a "friend" who wanted to ask some questions. (J.A. 19) A subsequent call was not recorded, but Greathouse testified that he discussed various aspects of a cocaine transaction with the friend and that he also spoke to Lonardo during the conversation. (J.A. 25) No evidence was offered as to the identity of the gentleman friend.[3]

Some time later on May 25, Lonardo telephoned Greathouse to arrange for a sale of cocaine. (J.A. 138-40) Greathouse arranged to meet Lonardo at a Hilton Hotel, and Greathouse left the cocaine under the passenger seat of his car. (J.A. 29) Greathouse met Lonardo inside the hotel where Lonardo received the keys to Greathouse's car. Thereafter, Lonardo removed the cocaine from Greathouse's car and carried it to petitioner's car. (J.A. 44) Almost immediately, the FBI agents made their arrests and searches. (J.A. 46).

In arguing to the district judge that the taped conversations should be admissible against petitioner, as well as against Lonardo,[4] the government specifically relied on the substance of the very conversations to which petitioner objected in order to satisfy Fed. R. Evid. 801 (d)(2)(E). (J.A. 71-74) Accepting the government's argument, the district court simply found that the evidence rule was satisfied. (J.A. 75) The court of appeals affirmed,

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[3] The sum of money that Greathouse testified the friend was willing to pay was $15,000 up front, which differed considerably from the amount found in petitioner's car. (J.A. 24)

[4] Any statements by Lonardo would, of course, have been personal admissions, which would have come in against him under Fed. R. Evid. 801 (d)(2)(A). Statements by Greathouse to Lonardo would either have been admissible against Lonardo to explain Lonardo's own admissions or as adoptive admissions by Lonardo under Fed. R. Evid. 801 (d)(2)(B).

specifically relying on the taped conversations to find sufficient evidence for the district judge to have determined that a conspiracy had been proved by a preponderance of the evidence to the judge's satisfaction. 781 F.2d at 542.

SUMMARY OF THE ARGUMENT

In order to satisfy the Confrontation Clause of the Sixth Amendment and Fed. R. Evid. 801 (d)(2)(E), a trial judge must make three findings before permitting out-of-court hearsay statements made by an alleged co-conspirator to be used against a defendant in a criminal case in federal court:[5] first, that there is sufficient independent evidence to prove that a conspiracy existed; second, that the declarant and the defendant were both members of the conspiracy; and third, that any statement was made in furtherance of and during the existence of the conspiracy. In deciding whether or not the government has laid a sufficient predicate for admission of co-conspirator statements, the trial judge must utilize the preponderance of the independent evidence standard with respect to the existence of the conspiracy and the membership therein of the co-conspirator and the defendant.[6]

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[5] The Confrontation Clause would have no applicability in a civil case, but the hearsay analysis would be the same. Fed. R. Evid. 801 (d)(2)(E) does not distinguish between criminal and civil cases. *See, e.g., Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 723 F.2d 238, 260-63 (3d Cir. 1983), *rev'd on other grounds*, ____ U.S. ____, 106 S.Ct. 1348 (1986).

[6] The preponderance standard is the usual standard employed by trial courts in making rulings on preliminary questions of fact relating to evidence issues. It should plainly be permissible for a trial judge to use a higher standard—e.g., to require clear and convincing evidence or proof beyond a reasonable doubt—in making such rulings, and some state courts may require more than a preponderance of the

Assuming that the requisite findings are made and that a statement by a co-conspirator qualifies under the evidence rule for admission against a defendant, petitioner does not contend that in each and every case the court must assess the circumstances of the case to determine whether the statement carries with it sufficient indicia of reliability to satisfy the Confrontation Clause. Rather, petitioner suggests when the hearsay exception for co-conspirator statements,[7] being a long standing exception to the general rule of evidence excluding hearsay statements offered for the truth of the matter stated, is satisfied, the presumption should be that the statements satisfying the exception also satisfy the Confrontation Clause. This presumption should not be conclusive, however. When a defendant who specifically objects on Confrontation Clause grounds and articulates reasons why co-conspirator statements are not only crucial in the case, but also are unusually unreliable, the trial judge should be required to determine whether the statements should, in

evidence. *Cf. Lego* v. *Twomey*, 404 U.S. 477, 489 (1972). Petitioner believes that Fed. R. Evid. 801 (d)(2)(E) requires a uniform approach in federal courts, and that the preponderance standard is appropriate as well as sufficient to satisfy constitutional requirements.

[7] This Court has previously observed that the drafting of Fed. R. Evid. 801 technically defines a co-conspirator statement as not being hearsay rather than as an exception to the hearsay rule as it was treated at common law. *United States* v. *Inadi*, ____ U.S. ____ 106 S.Ct. 1121, 1128 (1986). Whether Rule 801 (d) technically should be called an exemption from or an exception to the hearsay rule cannot be significant for purposes of a constitutional analysis, as this Court recognized in *Inadi:* "Whether such statements are termed exemptions or exceptions, the same Confrontation Clause principles apply." *Id.* at 1128 n.12.

fairness, be used against a defendant who has no opportunity to cross-examine the declarant.[8]

Applying these principles to the facts of his case, petitioner asks the Court to hold that the lower courts used an incorrect approach to determining the admissibility of an alleged co-conspirator's statements and either to hold that the statements were improperly admitted or to vacate and remand the case for further proceedings pursuant to the correct approach.

ARGUMENT

I. IN ORDER TO ADMIT AN ALLEGED CO-CONSPIRATOR'S DECLARATIONS AGAINST A DEFENDANT UNDER FEDERAL RULE OF EVIDENCE 801 (d)(2)(E), THE COURT MUST DETERMINE BY INDEPENDENT EVIDENCE A) THAT A CONSPIRACY EXISTED, AND B) THAT THE DECLARANT AND THE DEFENDANT WERE MEMBERS OF THIS CONSPIRACY

A. The Decision Whether To Admit Co-Conspirator Declarations Requires A Trial Judge To Engage In Preliminary Fact Finding Under Fed. R. Evid. 104 (a)

Federal Rule of Evidence 104 provides in relevant part as follows:

> (a) Questions of admissibility generally.—Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of the evidence shall be determined by the court, subject to the provisions of subdivision

[8] If the defendant has an opportunity for cross-examination, the Confrontation Clause problem will disappear under this Court's holdings in *California* v. *Green*, 399 U.S. 149 (1970); *Nelson* v. *O'Neil*, 402 U.S. 622 (1971).

> (b). In making its determination it is not bound by the rules of evidence except those with respect to privilege.

There can be no doubt that the decision whether a statement by a co-conspirator fits within Fed. R. Evid. 801 (d)(2)(E) is a determination that the trial judge must make under subdivision (a) of Rule 104. Rule 801 establishes conditions precedent to the admission of evidence that otherwise would be excluded under Fed. R. Evid. 802 as hearsay, and the determination of whether those conditions have been satisfied involves preliminary questions concerning "the admissibility of evidence." The Advisory Committee's Note accompanying Rule 104 (a) explains its scope. It states that "[t]he applicability of a particular rule of evidence often depends upon the exist ence of a condition," and "[t]o the extent that these inquiries are factual, the judge acts as a trier of fact." 56 F.R.D. 183, 197 (1972). The Note specifically gives as one example the determination whether a hearsay statement qualifies as a declaration against interest, which is a decision "made by the judge." *Id.* The same reasoning applies to fact finding under Fed. R. Evid. 801 (d)(2)(E).

Rule 104 (a) merely codifies the common law approach toward separating the functions of judge and jury. *See* McCormick on Evidence 139 (3d. E. Cleary ed. 1984); E. Morgan, Basic Problems of Evidence 45-50 (1962).

> "Entrusting the judge—rather than the jury—with the responsibility of determining certain factual questions serves a threefold purpose: First, it prevents the submission of highly technical evidentiary questions to a group of laymen ill equipped 'to do legal reasoning . . . .' Second, it insulates the jurors from the kinds of evidence that they may be unable to evaluate fairly; trepidations as to the ability of jurors fairly to evaluate certain kinds of evidence may give rise to various exclusionary rules. . . . Finally, resolution of the preliminary factual question by the judge may be necessary to preserve and protect the

> very interest sought to be furthered by the suppression of certain evidence."[9]

It is vital that the trial judge make the preliminary determination of facts necessary to evaluating the admissibility of statements under Fed. R. Evid. 801 (d)(2)(E). Jurors are untrained in the hearsay rule and unfamiliar with the concepts that underlie the co-conspirator's exception to or exemption from the general ban on hearsay evidence. The task falls naturally to the judge under Fed. R. Evid. 104 (a).

B. The Trial Judge Must Determine That A Conspiracy Existed And That The Declarant And The Defendant Were Members Of The Conspiracy As A Condition Of Admitting Evidence Of A Co-Conspirator's Statement Under Fed. R. Evid. 801 (d)(2)(E)

The showing required by a party seeking to rely upon Fed. R. Evid. 801 (d)(2)(E) is clearly set forth in the rule: the party must demonstrate that "[t]he [co-conspirator] statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Two findings—first, that a conspiracy is proved and, second, that the participation of both the declarant and the defendant against whom a co-conspirator's statement is offered also is proved—are necessarily required under the rule. Fed. R. Evid. 801 (d)(2)(E) imposes these requirements in three distinct ways: 1) The rule mandates that the statement

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[9] Saltzburg, Standards of Proof and Preliminary Questons of Fact, 27 Stan. L. Rev. 271 n.2 (1975). *See also* Maguire & Epstein, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 Harv. L. Rev. 392 (1927); Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L. Rev. 165 (1929).

offered must be "by a co-conspirator of a party," and this mandate cannot be satisfied unless a conspiracy in which both the declarant and the defendant participated is proved. 2) The rule requires proof that the statement was made during the course of *the* conspiracy in which the co-conspirator and the party were involved. 3) The rule requires the offering party to prove that the co-conspirator's statement was in furtherance of *the* same conspiracy. The second and third requirements, therefore, signify also that the proponent of a co-conspirator's statements must prove a conspiracy that includes both the declarant and the defendant.

The two findings necessitated by Fed. R. Evid. 801 (d)(2)(E) are of constitutional as well as of evidentiary dimensions. Unless the requisite proof of conspiracy and participation is offered, there would be no acceptable rationale for admitting a co-conspirator's statements against a defendant. Admission of statements that are neither reliable nor fairly attributable to a party under a notion of vicarious responsibility would violate the Confrontation Clause.

Most hearsay exceptions rest upon a foundation of necessity and reliability, and reliability is the most important factor in the formulation of exceptions, as the Advisory Committee on the Federal Rules of Evidence recognized. The Advisory Committee's Note to Fed. R. Evid. 803 states that "[t]he present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available." 56 F.R.D. at 303. The Notes accompanying both Rules 803 and 804 attempt to explain why the various exceptions are defensible under a reliability analysis. 56

F.R.D. at 303-20, 322-28. Several of the rules themselves make particular reference to reliability or trustworthiness. For example, the business records exception, Fed. R. Evid. 803 (6), and the public records exception, Fed. R. Evid. 803 (8), include clauses providing respectively that hearsay falling within these exceptions is admissible "unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness" and "unless the sources of information or other circumstances indicate lack of trustworthiness." Reliability or trustworthiness is also the linchpin of the two residual exceptions, Fed. R. Evid. 803(24) and 804 (b)(5).

By way of contrast, the admissions exception or exemption is not generally justified on reliability grounds. As the Advisory Committee's Note to Rule 801 explained, "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule." 56 F.R.D. at 297. The Note categorically states that "[n]o guarantee of trustworthiness is required in the case of an admission." *Id.*

Attempts have been made to argue that statements that meet the requirements of the co-conspirator's exception are sufficiently reliable as a general proposition to be admitted.[10] But it is well established that the primary justification for admission of one co-conspirator's statements against another co-conspirator is premised on an

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[10] *See, e.g.*, Model Code of Evidence 251 (1942); R. Lempert & S. Saltzburg, A Modern Approach to Evidence 395 (2d ed. 1982). But these arguments have been criticized. *E.g.*, R. Lempert & S. Saltzburg, *supra*, at 395-96.

agency principle. The Advisory Committee's Note to Rule 801 recognized this, even as it observed that "the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." 56 F.R.D. at 299.

Whether admissibility of co-conspirator's statements is justified exclusively on an agency theory or on this theory combined with a reliability argument, it is clear that, unless the conspiracy and the participation of the declarant and the defendant are proved, there can be no justification for admission of any given statement. There can be no agency if there is no common venture, and any reliability argument fails where a co-conspirator's statements were not in aid of a common undertaking with the defendant against whom the statements are offered.

This Court has implicitly recognized the logical force of this argument in *Lutwak* v. *United States*, 344 U.S. 604 (1953), a prosecution for conspiracy to defraud the United States and to circumvent the immigration laws by obtaining illegal entry of aliens as spouses of veterans. The Court found that acts that occur after a conspiracy has ended may be admitted as relevant evidence, but that statements require different treatment. *Id.* at 617.

> "Declarations stand on a different footing. Declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party. *Clune* v. *United States*, 159 U.S. 590. See *United States* v. *Gooding* (U.S.) 12 Wheat 460, 468-70. But such declarations can be used against the co-conspirator only when made in furtherance of the conspiracy. *Fiswick* v. *United States*, 329 U.S. 211, 217; *Logan* v. *United States*, 144 U.S. 263, 308, 309. There can be no furtherance of a conspiracy that has ended. Therefore, the declarations of a conspirator do not bind the co-conspirator if made after the conspiracy has ended. That is the teaching of *Krulewitch* v. *United States*, 336 U.S. 440, and *Fiswick* v. *United States*, 329 U.S. 211, both supra. Those cases dealt only with the declarations of one conspirator after the conspiracy had ended. . . ."

Id. at 617-18.

If statements by one former co-conspirator may not be admitted against a defendant after the conspiracy has ended, certainly statements made by one who has never been shown to be a co-conspirator are not admissible. This Court's opinions and the decisions of every circuit[11] that has addressed the question require proof that there was a conspiracy and that the co-conspirator whose statement is offered and the defendant against whom it is offered were members of that conspiracy.

C. The Trial Judge Also Must Determine That A Co-Conspirator's Statements Were Made During And In Furtherance Of A Conspiracy Before Admitting The Statements Against A Defendant

The final preliminary decision that the trial judge must make under Fed. R. Evid. 801 (d)(2)(E) is that statements made by a co-conspirator and offered against a defendant were made during the conspiracy and were in furtherance of the conspiracy. This is evident on the face of the rule and it has been accepted in this Court's decisions, as the quotation from *Lutwak*, *supra*, clearly demonstrates.

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[11] There has been some difference of opinion among the circuits as to the standard of proof that the trial judge must employ, but the basic proposition set forth here has been accepted by all of the circuits. The decisions are set forth in the discussion of the appropriate standard of proof, *infra*, at 20-23.

Although this point might appear to be outside the scope of the questions presented for review, petitioner briefly mentions this aspect of the trial judge's function because it is important to the second question presented, which is what quantum of independent proof is required to support a preliminary finding by the judge.

II. THE GOVERNMENT MUST PERSUADE THE TRIAL JUDGE BY A PREPONDERANCE OF THE INDEPENDENT EVIDENCE THAT IT HAS MET THE REQUIREMENTS FOR ADMISSION OF A CO-CONSPIRATOR'S STATEMENTS AGAINST A CRIMINAL DEFENDANT

A. This Court Has Declared That There Must Be Proof *Aliunde* Of Conspiracy

In *Glasser* v. *United States*, 315 U.S. 60 (1942), this Court addressed the foundation that must be laid before a co-conspirator's statement is admissible against another defendant. The discussion in *Glasser* arose in the context of a defendant's claim that he was denied the adequate and constitutionally guaranteed assistance of counsel in a prosecution alleging corruption on the part of Assistant United States Attorneys. One lawyer, Stewart, had been retained by Glasser before Stewart also was appointed by the trial judge to represent a co-defendant, Kretske. Glasser complained that Stewart did not object to the admission of statements made by Kretske which implicated Glasser, either by name or by nickname. This Court rejected the government's argument that Glasser was not harmed by counsel's failure to object.

> "Glasser contends that such statements constituted inadmissible hearsay as to him and that Stewart forewent this obvious objection lest an objection on behalf of Glasser alone leave the jury the impression that the testimony was true as to Kretske. The government attacks this argument as unsound, and,

> relying on the doctrine that the declarations of one conspirator in furtherance of the objects of the conspiracy made to a third party are admissible against his co-conspirators, *Logan* v. *United States*, 144 U.S. 263, contends that the declarations of Kretske were admissible against Glasser and hence no prejudice could arise from Stewart's failure to object. However, such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. *Minner* v. *United States* (CCA 10th) 57 F.2d 506; and see *Nudd* v. *Burrows*, 91 U.S. 426. Otherwise hearsay would lift itself by its own boot straps to the level of competent evidence."

Id. at 73-75. The conspirator statements quoted by the Court specifically made reference to Glasser or to his nickname "Red."[12] After quoting various statements, the Court proceeded to examine the proof *aliunde*.

In *United States* v. *Nixon*, 418 U.S. 683, 701 (1974), the Court stated that "[d]eclarations by one defendant may also be admissible against other defendants upon a sufficient showing, by *independent evidence*, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy."[13] The circuits have uniformly read *Glasser* and Fed. R. Evid. 801 (d)(2)(E) as requiring that independent evidence of conspiracy must be produced.[14]

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[12] The Court quoted the specifics of these statements. 315 U.S. at 73 n.5.

[13] Footnote omitted; emphasis added.

[14] As was the case with the findings that the trial judge must make, the circuits are in agreement that there must be independent evidence of conspiracy. They disagree, as the cases cited, *infra* at 20-23, will demonstrate, to a very minor extent on the statement of the standard that the judge must employ in making the required findings and on whether the conspirator statements may themselves be used as evidence of the conspiracy when the judge makes findings.

B. The Government Must Prove To The Trial Judge By A Preponderance Of The Evidence That The Requirements Of Rule 801 (d)(2)(E) Have Been Satisfied

Nothing in the Federal Rules of Evidence purports to set forth the burden of persuasion that proponents of evidence must satisfy when confronted with an objection to the admissibility of their evidence based upon an exclusionary rule or that parties or witnesses claiming a privilege must satisfy. The absence of any provision has compelled courts to look to common law approaches and to pre-Federal Rules of Evidence decisions in deciding what standard to use for a variety of fact finding associated with implementation of some of the most important and frequently invoked evidence rules—e.g., various exceptions to the hearsay rule,[15] the rule limiting expert reliance on facts or data not otherwise admissible in evidence to those reasonably relied upon,[16] or a claim of attorney-client, spousal or another common law privilege.[17] The traditional rule, recognized by this Court as such, is that the party who claims the benefit of an exception to an exclusionary rule must prove to the satisfaction of the trial judge that the exception applies while the claimant of a privilege must justify the claim by the same evidentiary standard.

In *Lego* v. *Twomey*, 404 U.S. 477 (1972), the Court addressed the question of the standard that the prosecution must satisfy to prove voluntariness of a confession. Although the petitioner, a defendant convicted in state court, argued that the standard should be proof beyond a

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[15] E.g., Fed. R. Evid. 803 (2) (exited utterance); Fed. R. Evid. 804 (b)(3) (declaration against interest).

[16] Fed. R. Evid. 703.

[17] Fed. R. Evid. 501.

reasonable doubt, the Court held that the preponderance of the evidence standard was adequate. *Lego* arose as a result of this Court's decision in *Jackson* v. *Denno*, 378 U.S. 368 (1964), which required a judicial determination of voluntariness prior to the admission of a confession.

In its *Lego* opinion, the Court explained the justification for the requirement of judicial screening of confessions in *Jackson:* "Precisely because confessions of guilt, whether coerced or freely given, may be truthful and potent evidence, we did not believe that a jury could be called upon to ignore the probative value of a truthful but coerced confession; it was also likely, we thought, that in judging voluntariness itself the jury would be influenced by the reliability of a confession it considered an accurate account of the facts." *Id.* at 483. The Court assumed as have most courts, that the usual standard for preliminary fact finding was the preponderance standard. It reasoned, with respect to *Jackson*, that "the then-established duty to determine voluntariness had not been framed in terms of a burden of proof," but that "[w]e could fairly assume then, as we can now, that a judge would admit into evidence only those confessions that he reliably found, at least by a preponderance of the evidence, had been made voluntarily." *Id.* at 484.

Lego was decided before this Court submitted the proposed Federal Rules of Evidence to the Congress. While the proposed rules were pending before Congress, the Court decided *United States* v. *Matlock*, 415 U.S. 164 (1974), holding that the government must prove voluntary consent to a search by a preponderance of the evidence. *Id.* at 177. It stated that "the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence." *Id.* at 177 n.14 (citing *Lego*). The Court reaffirmed *Lego* in *Colorado*

v. *Connelly*, ___ U.S. ___, 107 S.Ct. 515 (1986), as it held that the prosecution satisfies its burden of proving a waiver of the privilege against self-incrimination by meeting the preponderance of the evidence standard.

That the Court assumed the preponderance burden to be the usual burden in preliminary fact finding relating to evidence issues is demonstrated by the language in *Lego* that rejected the petitioner's argument that something more than the preponderance standard was needed when a confession was challenged on constitutional grounds: "But, from our experience over this period of time no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence. Petitioner offers nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard." 404 U.S. at 488.

It is obviously true that the Court addressed in both *Lego* and *Matlock* the standard to be used for constitutional questions. Thus, neither case can be said to hold that the preponderance standard is required for non-constitutional rulings. *Matlock* indicates, however, that the Court treated a suppression hearing as involving a preliminary question to be decided under Rule 104 (a), the same rule that governs admissibility of co-conspirator statements. 415 U.S. at 173-74.

There is strong support in logic as well as in the assumptions of courts[18] that the preponderance of the evidence standard should be employed for preliminary

[18] Distinguished commentators have made the same assumption. *See, e.g.*, 1 J. Wigmore, Evidence in Trials at the Common Law §17, at 770 (Tillers rev. 1983). *See also* 1 Wigmore §216, at 717 & n.4 (3d ed. 1940).

fact finding associated with the admission and exclusion of evidence. Rules like the hearsay rule are designed to exclude evidence that is deemed so unreliable that it is more likely to inhibit than to enhance a trier of fact's ability to reach a correct result. The party claiming an exception to the hearsay rule must bear a burden of showing that, at a minimum, the reliability or agency principles that support the exception are present. Otherwise, there is a greater chance that the evidence will have the harmful effects which underlie the rule of exclusion than there is that the evidence will increase the reliability of the judgment.[19]

Use of a standard lower than the preponderance standard would raise Confrontation Clause problems, since prosecutors would be permitted to rely upon out-of-court statements for their truth even after a trial judge determined that it is more likely than not that such statements are so unreliable or lacking in terms of evidence of agency that they could not pass muster under a hearsay analysis. The preponderance of the evidence standard assures that hearsay admitted under Fed. R. Evid. 801 (d)(2)(E) will more likely than not satisfy the minimum requirements for admission under the rule and under the Confrontation Clause, irrespective of whether these requirements are

[19] It should be noted that a defendant who claims the benefit of a hearsay exception also must demonstrate by a preponderance of the evidence that the requirements of the exception have been satisfied. Nothing in the argument made herein favors or disfavors defendants vis-a-vis the government with respect to evidence issues. The even-handed point that supports the argument is that evidence that cannot be shown, even by the slightest margin, to be more likely than not to fit within an exception to an exclusionary rule is by definition as likely to retard as to enhance the proceedings. Thus, it should be excluded.

thought to be grounded in notions of reliability or agency or in both.

C. The Government Must Prove The Existence Of A Conspiracy And The Membership Of The Declarant And The Defendant By A Preponderance Of The Independent Evidence[20]

When this Court's analysis in *Glasser* and *Nixon*, on the one hand, is combined with its adoption of the preponderance of the evidence standard in *Lego* and *Matlock*, on the other hand, a proper, fair and even-handed standard to preliminary fact finding with respect to co-conspirator statements emerges. The standard requires that the government, in order to use a co-conspirator's statements against a criminal defendant, must satisfy the trial judge by a preponderance of the independent evidence that there was a conspiracy and that the co-conspirator and the defendant were participants therein.[21]

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[20] *I.e.*, the evidence *aliunde* in the words of *Glasser, supra*.

[21] Before the enactment of the Federal Rules of Evidence, this Court never specifically addressed the burden of persuasion with respect to conspirator statements. *Glasser, supra*, required independent evidence, but it did not focus on the amount of such evidence that was required. In several decisions, the Court assumed that whatever standard applied had been satisfied. *See, e.g., Nudd* v. *Burrows*, 91 U.S. 426, 438 (1875) (bill of exceptions did not indicate "[w]hat proof had been given of the alleged concert and conspiracy on the part of the defendants, when the declarations of Emmons were offered to be proved," and "it is to be presumed it was sufficient to lay the proper foundation as to them for the introduction of the evidence"); *Wilborg* v. *United States*, 163 U.S. 632, 657-58 (1896) (Court assumed that a secret combination had been proved and that declarations of those engaged in it were admissible against participants). In dictum in *United States* v. *Nixon*, 418 U.S. 683, 701 n.14 (1974), the Court stated that "[a]s a preliminary matter, there must be substantial, independent evidence of the conspiracy, at least enough to take the question

Most of the circuits apply this standard or one that closely approximates the standard as articulated by petitioner.[22] The cited decisions indicate that seven circuits

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to the jury."

The standard that petitioner advocates requires the preponderance finding to be based upon independent evidence only with respect to existence of the conspiracy and membership therein. The discussion, *infra*, at 25-26, explains why the statements themselves are appropriately considered with respect to other preliminary fact finding that is done in connection with Fed. R. Evid. 801 (d)(2)(E).

[22] *United States* v. *Jackson*, 627 F.2d 1198 (D.C. Cir. 1980) (substantial independent evidence required); *United States* v. *Martorano*, 557 F.2d 1 (1st Cir.), *reh'g denied*, 561 F.2d 406 (1977), *cert. denied*, 435 U.S. 922 (1978) (preponderance standard, but judge may consider the statement seeking admission which ordinarily is to be given little weight); *United States* v. *Mastropieri*, 685 F.2d 776 (2d Cir.), *cert. denied*, 459 U.S. 945 (1982) (preponderance of independent evidence required); *United States* v. *Ammar*, 714 F.2d 238 (3d Cir.), *cert denied*, 464 U.S. 936 (1983) (preponderance of independent evidence required); *United States* v. *Portsmouth Paving Corp.*, 694 F.2d 313 (4th Cir. 1982) (fair preponderance of independent evidence required); *United States* v. *James*, 590 F.2d 575 (5th Cir.) (en banc), *modifying*, 576 F.2d 1121 (1978), *cert. denied*, 442 U.S. 917 (1979) (preponderance of independent evidence required); *United States* v. *Arnott*, 704 F.2d 322 (6th Cir.), *cert. denied*, 464 U.S. 948 (1983) (preponderance of evidence, but trial judge may consider statements seeking admission); *United States* v. *Santiago*, 582 F.2d 1128 (7th Cir. 1978) (preponderance of evidence, but reserving judgment as to whether statements seeking admission may be used); *United States* v. *Bell*, 573 F.2d 1040 (8th Cir. 1978) (fair preponderance of the independent evidence); *United States* v. *Rabb*, 752 F.2d 1320 (9th Cir. 1984), *cert. denied*, 471 U.S. 1019 (1985) (reaffirming prima facie evidence approach, but stating that government must produce substantial independent evidence of conspiracy to satisfy test); *United States* v. *Andrews*, 585 F.2d 961 (10th Cir. 1978) (preponderance of independent evidence required); *United States* v. *Salisbury*, 662 F.2d 738 (11th Cir. 1981), *cert. denied*, 457 U.S. 1017 (1982) (preponderance of the independent evidence).

require the government to prove the conspiracy and membership therein, two of the required elements of Rule 801 (d)(2)(E), by a preponderance of the independent evidence.[23] Two other circuits follow this approach but permit consideration of the co-conspirator statements to which objection is made in analyzing whether the government has met the requirements of the rule.[24] One circuit has left open the question whether the statements themselves may be considered.[25] Ten circuits, then, agree on the preponderance of the evidence approach. Seven agree that the evidence of conspiracy and membership should be assessed independently of the challenged co-conspirator statements. Another[26] would not exclude consideration of the challenged statements, but ordinarily would require trial judges to give the statements only slight weight. The two circuits that do not use the preponderance of the evidence test impose a substantial independent evidence requirement on the government,[27] although it is difficult to tell whether this is more or less demanding than the preponderance standard.

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[23] See cases cited in note 22, *supra*, from the Second, Third, Fourth, Fifth, Eighth, Tenth and Eleventh Circuits.

[24] See cases cited in note 22, *supra*, from the First and Sixth Circuits.

[25] See case cited in note 22, *supra*, from the Seventh Circuit.

[26] See case cited in note 22, *supra*, from the First Circuit.

[27] See cases cited in note 22, *supra*, from the District of Columbia and Ninth Circuits. At one time the Ninth Circuit might have distinguished substantial independent evidence from prima facie evidence, but it has now abandoned the distinction. *See United States* v. *Fleishman*, 684 F.2d 1329 (9th Cir.), *cert. denied*, 459 U.S. 1044 (1982); *United States* v. *Silverman*, 771 F.2d 1193 (9th Cir. 1985); *United States* v. *Huber*, 772 F.2d 585 (9th Cir. 1985); *United States* v. *Rabb*, 752 F.2d 1320 (9th Cir. 1984), *cert. denied*, 471 U.S. 1019 (1985).

There is an undeniable division of authority as to the proper approach to co-conspirator statements, but that division is not as great as the agreement among the circuits that the preponderance of the evidence standard should be used (ten circuits) and that only independent evidence should be considered with respect to conspiracy and membership (nine circuits). In view of the extensive agreement, two related issues present themselves: Is the preponderance of the evidence standard that has been so widely adopted preferable to the other standards? And, is the limitation placed upon a trial judge to consider only the independent evidence in deciding whether conspiracy and membership have been demonstrated the most persuasive and defensible approach to co-conspirator statements when preliminary findings of fact must be made under Rule 801 (d)(2)(E)?

Petitioner submits that an affirmative answer to both questions provides a clear, workable, and even-handed rule that has proved over the years it has been employed that it works to protect the interests of both sides in a federal criminal prosecution. Affirmative answers will promote consistency and predictability in the district and circuit courts and will require only the smallest change in the approach of a small minority of lower federal courts. Affirmative answers are also consistent with this Court's historic approach to co-conspirator statements.[28]

First, petitioner urges this Court to declare that the overwhelming majority of circuit courts have correctly utilized the preponderance standard in making admissibility decisions under Fed. R. Evid. 104 (a) and

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[28] Like the Advisory Committee, this Court has resisted efforts to expand the scope of the co-conspirator's exception to the hearsay rule. *See Wong Sun* v. *United States*, 371 U.S. 471, 490 (1963).

Fed. R. Evid. 801 (d)(2)(E). The preponderance standard, as noted above, has been assumed by this Court, other courts, and commentators to be the appropriate standard for most preliminary factual issues raised when evidence is offered and objection is made. Under a the prima facie evidence standard,[29] or the virtually identical substantial evidence standard, trial judges and trial lawyers have little, if any, guidance as to how much evidence is substantial. The preponderance standard has worked well, as this Court observed in *Lego*. It assures that evidence is more likely than not reliable or satisfactory and therefore supports admission. Some commentators have urged that a beyond a reasonable doubt test is preferable.[30] Others have defended the traditional preponderance standard.[31] Petitioner submits that the overwhelming majority of circuits have correctly interpreted Fed. R. Evid. 104 (a) and Fed. R. Evid. 801 (d)(2)(E) as adopting the same preponderance standard that has traditionally been used in preliminary fact finding. That standard strikes a fair balance between the government's interest in offering co-conspirator statements and the defendant's interest in protection against unwarranted admission of another's statements on either an agency or a reliability theory.

Assuming that the preponderance of the evidence is the correct standard, petitioner next asks this Court to find that the vast majority of the circuits which have adhered to *Glasser* and have required trial judges to find a conspiracy and membership therein on the basis of independent

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[29] There is substantial confusion as to what exactly a prima facie showing would be. *See* S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 729-32 (4th ed. 1986).

[30] *See* 1 Weinstein's Evidence § 104[05], at 104-43.

[31] Support for this balance can be found in S. Saltzburg & K. Redden, *supra* note 29, at 732-33; Saltzburg, *supra* note 9, at 302-04.

evidence, not by relying upon the challenged co-conspirator statements, are correct. No court has joined the Sixth Circuit in holding that the very statements challenged under Rule 801 (d)(2)(E) may furnish the primary support for their admissibility, as occurred in the instant case. Petitioner submits that the Sixth Circuit has adopted an approach that ignores the derivation of the co-conspirator rule and the conscious decision that was made not to expand it when the Federal Rules of Evidence were enacted.

Before turning to the background of Rule 801 (d)(2)(E), petitioner points out that the circuits that have held that only independent evidence may be considered when a trial judge decides whether a conspiracy has been proved and the co-conspirator and the defendant were participants therein have not concluded that the conspirator statements must be disregarded in deciding whether they were made during and in furtherance of the conspiracy.[32] Once the trial judge has found the requisite conspiracy and participation by a preponderance of the evidence, the judge may—in fact, often must—consider the substance of the challenged statements in making a determination whether they were in furtherance of a conspiracy and even whether they were made during a conspiracy.[33] The

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[32] The majority of circuits have held that proof of conspiracy and membership therein by the preponderance of the independent evidence establishes the existence of the kind of relationship between the declarant and the defendant that warrants examination of the contents of the statements to see whether they were indeed part of the conspiratorial venture that the trial judge has found.

[33] As petitioner observes in note 32, *supra*, the trial judge is also justified in examining the contents of the statement once it has been established for purposes of preliminary fact finding that the declarant and the defendant were members of the same conspiracy. This is

judge must do so because statements that are "casual conversation" are not admissible under the rule.[34] Without examining the substance of the statements, the trial judge could not reasonably determine their nature. Similarly, if a claim is made that a statement actually terminated a conspiracy or one person's participation, the trial judge could not decide whether that communication was during (or in furtherance of) unless the contents could be examined. Thus, it must be true that the trial judge may examine the challenged statements to make the judgment whether a statement was made in furtherance of and during a conspiracy.

But, the fact finding concerning the existence of a conspiracy and the participation of the co-conspirator and a defendant raises different concerns. This court stated in *Glasser*, 315 U.S. at 75, that declarations by a co-conspirator may only be admitted against a defendant who was not present when they were made, only if there is proof *aliunde* that both are connected with the conspiracy. "Otherwise hearsay would lift itself by its own boot straps to the level of competent evidence." Lower courts have also been concerned about boot-strapping.[35] In light of *Glasser*, the argument that the conspirator's statements should not themselves be considered part of the proof *aliunde* might be conclusive. But, it is called into question by Fed. Rule Evid. 104 (a) and Fed. R. Evid. 1101 (d)(1),

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similar to an agency analysis in a respondant superior case. Unless agency is shown, an agent's acts may not be considered against a principal. Once agency is shown, the acts may be examined to see whether they fall within the scope of the agency.

[34] *See, e.g., United States* v. *Lieberman*, 637 F.2d 95 (2d Cir. 1980).

[35] *See, e.g., United States* v. *DeFillippo*, 590 F.2d 1228 (2d Cir.), *cert. denied*, 442 U.S. 920 (1979).

which respectively provide that "[i]n making its determination [on a preliminary question of fact] it [the court] is not bound by the rules of evidence except those with respect to privilege," and "[t]he rules (other than with respect to privileges) do not apply in the following situations: (1) Preliminary questions of fact.—The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104."

Were these rules read without regard to the drafters' intent and without reference to the law that preceded them, it surely would seem that the rules permit the trial judge to rely upon any available evidence in making any preliminary finding of fact. The intent of the drafters in these rules was identified by this Court in *United States* v. *Matlock*, 415 U.S. at 173. The Court noted that there has traditionally been a different evidentiary approach to preliminary findings of fact and to trial on the merits, and wrote as follows: "That the same rules of evidence governing criminal jury trials was not generally thought to govern hearings before a judge to determine evidentiary questions was confirmed . . . when the Court transmitted to Congress the proposed Federal Rules of Evidence. . . . The rules in this respect reflect the general views of various authorities on evidence. . . . ." *Id.* at 173-74. The Court added that "[t]here is, therefore, much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel." *Id.* at 175.

The Advisory Committee's Note to Rule 104 (a), 56 F.R.D. at 197, supports the description in *Matlock* of

Rule 104 (a). Generally speaking, Rules 104 (a) and 1101 (d)(1) provide the trial judge with flexibility in making preliminary rulings. Such flexibility is important, for, as the Advisory Committee noted, in some cases the trial judge must consider the challenged evidence in order to make a ruling. The example offered by the Advisory Committee is that "the content of an asserted declaration against interest must be considered in ruling whether it is against interest." 56 F.R.D. at 197. Petitioner does not challenge this argument; in fact, the point made earlier concerning the need to examine a co-conspirator's statement in order to decide whether it was in furtherance of conspiracy is very similar.

Petitioner contends, however, that neither Rule 104 (a) nor Rule 1101 (d)(1) was intended to change the basic rule that a conspiracy and membership therein must be demonstrated by sufficient independent evidence before the trial judge examines a statement in order to determine whether it was made during and in furtherance of the conspiracy. "[T]he important thing . . . is that Rule 104 (a) does not define what the preliminary question of fact is that the Trial Court must decide. In some jurisdictions that have used the preponderance of the evidence standard—e.g., the Second and Third Circuits—the Courts of Appeals have held that one part of the preliminary question is whether a conspiracy that included the declarant and the defendant against whom a statement is offered has been demonstrated to exist on the basis of evidence independent of the declarant's hearsay statements."[36]

Because the more important, if not the exclusive, justification for admitting co-conspirator statements involves an agency principle, this Court in *Glasser, supra*, and the

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[36] S. Saltzburg & K. Redden, *supra* note 29, at 735.

majority of the circuits following the adoption of the Federal Rules of Evidence have determined that it is essential, if a fair trial is to be assured, that there be sufficient evidence of conspiracy and membership offered before the party relying on a co-conspirator's statement may use it against someone other than the declarant. Without independent evidence, it is possible that a co-conspirator's statements will be introduced primarily on the basis that someone outside of court mentioned a defendant and made allegations against that defendant, without any guarantee of reliability or any credible proof of agency. Moreover, the same statements that are used to boostrap into evidence hearsay statements against a defendant may be damning evidence that will be used to hold the defendant liable, under *Pinkerton* v. *United States*, 328 U.S. 640 (1946), for acts committed by others.

Without independent evidence of conspiracy that is sufficient to support the preponderance of the evidence standard (i.e., to make it more likely than not that there was a conspiracy involving the declarant and the defendant), petitioner submits that there is no justification for admitting a statement; neither agency nor reliability has been demonstrated. Last term this Court held in *Lee* v. *Illinois*, ___ U.S. ___, 106 S.Ct. 2056 (1986), that a defendant's confrontation right was denied when a co-defendant's confession was used against him. The Court wrote that "[w]e need not address the question of Thomas' availability, for we hold that Thomas' statement, as the confession of an accomplice, was presumptively unreliable and that it did not bear sufficient independent 'indicia of reliability' to overcome that presumption." 106 S.Ct. 2061. A statement by a co-conspirator implicating a defendant is equally damning and traditionally has been viewed as presumptively inadmissible until the proponent

has been able to show by independent evidence a conspiracy and the membership in it of the defendant and the declarant, which gives rise to the justifications for admissibility—agency and reliability.[37] Without the traditional requirement of independent evidence, admission of a co-conspirator's statements against a defendant broadens the scope of the co-conspirator's exception and poses serious Confrontation Clause problems.

The Advisory Committee's Note to Fed. R. Evid. 801 (d)(2)(E) establishes that the Committee believed it was not broadening the co-conspirator's exception or exemption. 56 F.R.D. at 299. The wording of Fed. R. Evid. 801 (d)(2)(E) is consistent with this belief. The rule provides that a statement that otherwise would be excluded as hearsay is admissible if it is "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." The Advisory Committee apparently assumed that the trial judge would first determine that there was a conspiracy in which the declarant and the party were members and then proceed to find whether a statement was made during the course and in furtherance of the conspiracy.

The requirement that the determination of the conspiracy and its membership be made on independent evi-

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[37] In *Lee*, the Court rejected the argument that the statement should have been acceptable as a declaration against interest: "We reject respondent's categorization of the hearsay involved in this case as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." 106 S. Ct. at 2064 n.5. A statement by a co-conspirator is equally prejudicial and should be equally unacceptable without the independent evidence of conspiracy and membership that brings the statement within Fed. R. Evid. 801 (d)(2)(E).

dence, petitioner argues, is essential to avoiding Confrontation Clause problems.[38] In *United States* v. *Inadi*, ___ U.S. ___ 106 S.Ct. 1121 (1986), the dissenting opinion quoted with approval the following statement:

> "Conspirators' declarations are good to prove that some conspiracy exists but less trustworthy to show its aims and membership. The conspirator's interest is likely to lie in misleading the listener into believing the conspiracy stronger with more members (and different members) and other aims than in fact it has. It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis for law."
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> 106 S.Ct. at 1131, (Marshall J., dissenting).[39]

Although the majority ultimately reached a different conclusion with respect to the necessity for an unavailability requirement, it reasoned in part that a requirement that the government show unavailability would be unduly burdensome on the judicial system. 106 S.Ct. at 1128. Without quarreling with the *Inadi* result, petitioner notes that the effect of *Inadi* is to remove an opportunity in many cases for a defendant to examine a co-conspirator whose statement is offered. This means

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[38] Petitioner's final argument, *infra*, suggests that, if the Court reads the Federal Rules of Evidence as incorporating the proof *aliunde* requirement as most circuits have already done, statements that are admissible under Fed. R. Evid. 801 (d)(2)(E) generally will not require an independent Confrontation Clause analysis. But, if the Court holds that a trial judge may rely on the challenged hearsay statements to support an admissibility ruling, petitioner would argue that in every case a second-level Confrontation Clause analysis would be necessary, since there would be no warrant for confidence in either the reliability or the agency aspect of the statements.

[39] Quoting from Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159, 1165-66 (1954).

that the foundation requirement for admissibility is as important, if not more so, today as when *Glasser, supra*, was decided. Unless the proponent of a co-conspirator's statement can satisfy the minimum standard and persuade a trial judge by independent evidence that a statement was made by one co-conspirator as part of a conspiracy involving the defendant, there is no adequate basis for admitting the statement on agency or reliability grounds. Admission would violate the Confrontation Clause even if it would satisfy Fed. R. Evid. 801 (d)(2)(E).[40]

The circuits that have utilized the standard advocated herein have not found problems with it. Indeed, the decisions in these circuits provide clear guidance to trial judges and to prosecutors as to what is expected of them. Moreover, the decisions impinge only slightly on the flexibility otherwise provided by Rule 104 (a), since hearsay other than the very co-conspirator statements to which objections are made may be considered as part of the independent evidence. Personal admissions by defendants, for example, commonly provide part of the foundation for admissibility of statements under Fed. R. Evid. 801 (d)(2)(E).[41] Moreover, acts and even statements that

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[40] Admission would violate the standard set forth by a plurality of the Court in *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) (plurality opinion): "The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of the fact [has] a satisfactory basis for evaluating the truth of the prior statement.' *California* v. *Green*, 399 U.S., at 161." There would be no satisfactory basis for a jury's evaluating the relationship of the defendant, against whom a co-conspirator's statement was offered, to the co-conspirator-declarant or to the alleged conspiracy.

[41] *E.g.*, *United States* v. *Ziele*, 734 F.2d 1447 (11th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

are not offered for their truth may be admitted without raising either hearsay or confrontation problems.[42]

III. ASSUMING THAT THE TRIAL JUDGE FINDS BY A PREPONDERANCE OF THE INDEPENDENT EVIDENCE THAT A CONSPIRACY EXISTED THAT INCLUDED THE CO-CONSPIRATOR AND THE DEFENDANT, AND THE JUDGE ALSO FINDS THAT THE CO-CONSPIRATOR'S STATEMENT WAS MADE DURING AND IN FURTHERANCE OF CONSPIRACY, GENERALLY NO ADDITIONAL RELIABILITY DETERMINATION IS REQUIRED BY THE CONFRONTATION CLAUSE[43]

A. The Hearsay Rule And The Confrontation Clause Protect Similar Interests, But Are Not Identical In Their Scope

In *Dutton* v. *Evans*, 400 U.S. 74 (1970), a plurality of the Court wrote as follows: "It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now." *Id.* at 86 (footnotes omitted). Prior to *Dutton*, the Court had determined in *California* v. *Green*, 399 U.S. 149, 155-56 (1970), that the Confrontation Clause may be violated even where hearsay rules are not, and that evidence admitted in violation of long-established hearsay rules does not lead to a conclusion that there is an automatic confrontation violation.

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[42] *See Tennessee* v. *Street*, 471 U.S. 409 (1985).

[43] As noted earlier, the Advisory Committee concluded that a finding of reliability was not a prerequisite to admission of a co-conspirator's statement. Fed. R. Evid. 801 (d)(2)(E) makes no mention of reliability. Thus, petitioner assumes that if a reliability analysis were to be required, its source would be the Confrontation Clause.

Both the hearsay rule and the Confrontation Clause address similar concerns in a criminal case: to wit, "[an] underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence." *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980). The more effective the hearsay rule is in screening out the least acceptable forms of hearsay, the less pressure is placed on the Confrontation Clause to assure that defendants are receiving fair trials.

B. *Dutton* v. *Evans* Establishes That There May Be Confrontation Problems Even Though A Statement Qualifies For Admission As A Co-Conspirator's Statement

Eight Justices concluded in *Dutton* v. *Evans*, 400 U.S. 74 (1970), that the fact that a statement qualified for admission under a hearsay exception for co-conspirator's statements did not automatically mean that it met the requirements of the Confrontaton Clause. Although four Justices found that the statement did not violate the Clause and four dissenters argued that it did, only Justice Harlan accepted the argument that the Confrontation Clause did not impose limitations on the definitions of hearsay and the exceptions to the hearsay rule.[44] Since *Dutton*, the Court has reiterated that "[t]he historical evidence leaves little doubt . . . that the Clause was intended to exclude some hearsay." *Ohio* v. *Roberts*, 448 U.S. at 63.

The Court has also written, however, that "reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception," while "[i]n

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[44] Justice Harlan cast the fifth vote for affirming the conviction. 400 U.S. at 93-100 (Harlan J., concurring in the judgment).

other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.* at 66. In *Inadi*, 106 S.Ct. at 1124 n.3, the Court left open the question whether a statement qualifying for admissibility under Fed. R. Evid. 801 (d)(2)(E) must satisfy an additional reliability standard derived from the Confrontation Clause.

Petitioner submits that, as long as this Court requires the trial judge to determine by a preponderance of the independent evidence that a conspiracy existed and that a declarant and a defendant were members, and the trial judge also finds by a preponderance of all the evidence that a statement was made during and in furtherance of conspiracy, no additional finding ought to be deemed necessary in the typical case to satisfy the Confrontation Clause. The evidence rule would be sufficient to protect a defendant from having statements used when they could not fairly be attributable to the defendant under an agency or a reliability analysis.

This argument is consistent with *Dutton*, *supra*. The problem in *Dutton* was that the Georgia rule was not the common law, traditional approach to co-conspirator statements, because Georgia had a unique approach to the termination of a conspiracy. That rule invited the introduction of statements made after the end of any true joint relationship among former conspirators. Thus, this Court accordingly tested the statement that was admitted in that case under a reliability analysis.

Were the Court to weaken the proof *aliunde* requirement in the instant case, *Dutton* would indicate that a defendant should be able to compel a trial judge to make a Confrontation Clause analysis notwithstanding the admissibility of evidence under Fed. R. Evid. 801

(d)(2)(E). But, as long as the preponderance of the evidence standard and the independent evidence requirement are retained, a Confrontation Clause analysis would be superfluous in the typical case. The advantages, then, of interpreting the evidence rule to track the approach of the majority of circuits include not only the clarity provided by the interpretation, but also the avoidance of Confrontation Clause arguments in every case in which a co-conspirator's statement is offered.

The only cases in which a trial judge should find it necessary to test a co-conspirator's statement that falls within Fed. R. Evid. 801 (d)(2)(E) under the Confrontation Clause are those in which a defendant specifically objects on Confrontation Clause grounds and articulates reasons why co-conspirator statements are not only crucial in the case, but also are unusually unreliable. In these atypical cases, the trial judge should be required to determine whether the statements should, in fairness, be used against a defendant who has no opportunity to cross-examine the declarant.

Dutton, *supra*—which involved a statement made by one alleged co-conspirator, Williams, that was used against another alleged co-conspirator, Evans, in a case in which a third alleged co-conspirator, Truett, testified against Evans—suggests what the atypical cases might look like:

> "First, the statement contained no express assertion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight. Second, Williams' personal knowledge of the identity and role of the other participants in the triple murder is abundantly established by Truett's testimony and by Williams' prior conviction. It is inconceivable that cross-examination could have shown that Williams was not in a position

> to know whether or not Evans was involved in the murder. Third, the possibility that Williams' statement was founded on faulty recollection is remote in the extreme. Fourth, the circumstances under which Williams made the statement were such as to give reason to suppose that Williams did not misrepresent Evans' involvement in the crime. These circumstances go beyond a showing that Williams had no apparent reason to lie to Shaw. His statement was spontaneous, and it was against his penal interest to make it. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant."

400 U.S. at 88-89 (plurality opinion).

If one alleged co-conspirator, who had reason to believe that he and others were under investigation, made statements suggesting that another person or several others were responsible for various things, such statements, assuming they still might be in furtherance of conspiracy, might be suspect. They would be even more suspect if the co-conspirator who made the statements could not have had personal knowledge about events or the events were remote so that memory might well be unreliable. The burden of alleging specific defects and of demonstrating their significance would have to be borne by a defendant before the trial judge would need to make a Confrontation Clause decision.

In holding open the possibility that in unusual cases the Confrontation Clause might exclude statements that qualified for admission under Fed. R. Evid. 801 (d)(2)(E), petitioner suggests that the Court use the same type of approach, albeit in reverse, that it used in *Lee* v. *Illinois*, *supra*. Addressing the situation of one defendant's confession implicating another defendant, the Court

described its decision in *Bruton* v. *United States*, 391 U.S. 123 (1968), as resting on the fact that a confession that incriminates an accomplice is so "inevitably suspect" and "devastating" that the ordinarily sound assumption that a jury will be able to follow faithfully its instructions could not be applied. 106 S.Ct. at 2063. But the Court recognized that the presumption could be rebutted and that a "showing of particularized guarantees of trustworthiness" would satisfy confrontation concerns, citing *Ohio* v. *Roberts*. *Id.* at 2063-64.[45]

The presumption under Fed. R. Evid. 801 (d)(2)(E), if the appropriate standard for preliminary fact finding is adopted, should be that when the rule is satisfied the Confrontation Clause is satisfied also.[46] Only in cases in

[45] Petitioner submits that nothing in *Colorado* v. *Connelly*, ____ U.S. ____, 107 S.Ct. 515 (1986), suggests a different result. This Court rejected the argument by the respondent in *Connelly* that, before a confession is admitted against a defendant, a "free will" determination should be required in addition to a determination that the government did not coerce a statement from a suspect. The opinion for the Court clearly indicates that the only argument made by respondent rested upon the Fifth Amendment privilege against self-incrimination and the coerced confession doctrine. *Connelly* involved the question of the fairness of using an individual's own statements against him. In the instant case, the issue is whether a third party's statement may be used against a defendant, and that issue involves the Confrontation Clause of the Sixth Amendment.

[46] The federal circuits have been divided over the relationship of the Confrontation Clause to Fed. R. Evid. 801 (d)(2)(E). Some appear to hold that statements that satisfy the rule never need be examined for reliability. *See, e.g., United States* v. *Chindawongse*, 771 F.2d 840 (4th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct 859 (1986); *United States* v. *Chiavolo*, 744 F.2d 1271 (7th Cir. 1984). That is the approach taken by the court of appeals in the instant case. 781 F.2d at 543. Other courts have held that satisfaction of the evidence rule does not necessarily indicate satisfaction of the constitutional standard. *See, e.g., United States* v. *Pagan*, 721 F.2d 24 (2d Cir. 1983); *United*

which the defendant is able to demonstrate particularized dangers of unreliability with respect to critical prosecution evidence will the Confrontation Clause have independent force.[47]

States v. *DeLuna*, 763 F.2d 897 (8th Cir.), *cert. denied sub nom. Thomas* v. *United States*, ____ U.S. ____, 106 S.Ct. 382 (1985); *United States* v. *Lopez*, 803 F.2d 969 (9th Cir. 1986). Some courts have noted that confrontation attacks have been consistently rejected but have not conclusively ruled that an attack will never succeed. *See, e.g., United States* v. *Dunn*, 758 F.2d 30 (1st Cir. 1985). In some cases, courts have rejected specific confrontation arguments without clearly indicating whether in other settings the arguments might prevail. *See, e.g., United States* v. *Alfonso*, 738 F.2d 369 (10th Cir. 1984); *United States* v. *Georgia Waste Systems, Inc.*, 731 F.2d 1580 (11th Cir. 1984). Generally, the federal appellate courts have not examined the relationship of the standard used for preliminary fact finding and the Confrontation Clause standard. Petitioner submits that the preponderance standard, properly focusing on independent evidence of conspiracy and membership, plus findings with respect to the timing and the relationship of statements to a conspiracy, would satisfy confrontation concerns in the vast majority of cases. Petitioner notes that the jurisdiction that has been most burdened with Confrontation Clause claims is the Ninth Circuit, which has not adopted the preponderance standard. *See, e.g., United States* v. *Lopez, supra; United States* v. *Mouzin*, 785 F.2d 682 (9th Cir.), *cert. denied sub nom. Charvigal* v. *United States*, ____ U.S. ____, 107 S.Ct. 574 (1986); *United States* v. *Jennell*, 749 F.2d 1302 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S.Ct. 114 (1985); *United States* v. *O'Connor*, 737 F.2d 814 (9th Cir. 1984), *cert. denied*, 469 U.S. 1218 (1985); *United States* v. *Ordonez*, 737 F.2d 793 (9th Cir. 1984).

[47] If petitioner's argument prevails, there will be no need to reach a Confrontation Clause argument in this case. *See* note *48 infra*. If, however, the Court holds that conspirator statements may be admitted upon something less than proof by a preponderance of the independent evidence of conspiracy and membership, petitioner would rely upon the Confrontation Clause as well as upon the evidence rule. In the instant case, no person other than Lonardo made statements suggesting that there was a conspiracy. Lonardo had his own reasons

CONCLUSION

The district court and the court of appeals relied heavily on the contents of taped conversations to conclude that the government had shown sufficient evidence of conspiracy to admit the conversations against petitioner.[48] Petitioner asks the Court to hold that the lower courts used an

for indicating to Greathouse that he had buyers. Yet, petitioner could not examine Lonardo. Nothing in Lonardo's statements suggests reliability.

[48] Under the standard of proof for preliminary fact finding that petitioner urges, there was plainly insufficient evidence to support the trial judge's ruling. The trial judge made no findings of fact, but simply accepted the government's argument that Fed. R. Evid. 801 (d)(2)(E) had been satisfied. It is virtually impossible to believe that the trial judge could have admitted the taped statements for the truth of the matters asserted therein without relying on the contents of the statements as the principal, if not the exclusive, basis for finding that the evidence rule was satisfied. The government offered no evidence tending to prove that petitioner knew Lonardo prior to the date of petitioner's arrest, that petitioner had any knowledge of Lonardo's relationship to any other prospective purchasers of cocaine, or that petitioner and Lonardo had done anything more than agree that on a single occasion one would receive cocaine from the other. On these facts, if this Court accepts the standard of proof that petitioner proposes, it would be justified in holding that there was insufficient independent evidence of conspiracy to warrant admission of the taped conversations and to spare both sides and the court of appeals the burden of revisiting the issue.

incorrect approach to Fed. R. Evid. 801 (d)(2)(E) and either to hold that the taped statements were improperly admitted or to vacate the judgment and remand the case for further proceedings consistent with a correct approach.

Respectfully Submitted

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